DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

29689

FILE: B-213379 **DATE:** October 29, 1984

MATTER OF:
Deutsche Bundesbahn

DIGEST:

Absent specific authority, appropriated funds may not be used for permanent improvements to property not owned by Government. Where railroad controlled by the German Government installed safety improvement on U.S. controlled, German-owned railroad tracks U.S. Forces may not contribute to cost because governing North Atlantic Treaty Organization (NATO) treaty provisions do not require U.S. Forces to pay such costs.

Introduction

The U.S. Army Finance and Accounting Center has submitted the claim of the Deutsche Bundesbahn (DB) (German Federal Railway) for $DM 131,214.09 for settlement by the General Accounting Office (GAO) as a "doubtful claim" (Title 4, GAO Policy and Procedures Manual for Guidance of Federal Agencies, § 5-1). The German claim is for the cost of installing automatic safety equipment on U.S. controlled, German-owned railroad tracks. The governing North Atlantic Treaty Organization (NATO) treaty provisions do not obligate the U.S. Forces to pay the claimed costs and, without specific authority, appropriated funds may not be used to make permanent improvements to property which is not owned by the Government. For the reasons discussed below, the claim must be denied.

Background

According to the record in this case, all railroad tracks, connections and sidings in the Federal Republic of Germany (FRG) are owned by the German Government. The tracks are operated and maintained by the DB, an instrumentality of the FRG. Under the NATO Status of Forces Agreement (SOFA) and its Supplementary Agreement, U.S. Forces control the limited access tracks which lead from the DB connection switches to the U.S. Forces training facilities at Grafenwoehr and Vilseck. The record indicates that these limited access tracks are used by both the U.S. Forces and the Bundeswehr (the German Federal Army) in moving troops and equipment to and from the training facilities.

030454

Several years ago, the DB mandated the installation of certain automatic equipment to improve safety at rail connections. Prior to that time, trains switching between main line tracks and sidings were controlled by telephone only. The DB determined that the safety standards for the entire German rail system, including the U.S. controlled tracks, should be raised.

The file submitted in this case reflects that in June 1976 the Facilities Engineer at Grafenwoehr was approached by a local DB official concerning the required improvements. Stating that the DB would do the actual construction at no cost to the U.S., the official requested the U.S. Forces to do certain earthwork necessary for the installation of signals, warning signs and track blocking equipment. The official's oral request was confirmed in a letter from the DB to the U.S. Forces dated August 1, 1976. The letter explained why the safety improvements were required and requested the U.S. Forces to perform the necessary earthwork, but made no mention of any U.S. liability for the cost of materials or construction.

The U.S. Forces prepared the sites at Grafenwoehr and Vilseck as requested, and from July 1976 to July 1977 the DB installed the safety equipment at the two locations. During this same period the U.S. Forces received the first indication that the German Government considered the cost of the safety improvements to be a U.S. responsibility. A letter from the German Superior Finance Administration, dated February 24, 1977, estimated the total cost of construction for both locations ($DM 96,000) and, citing Article 63 of the NATO SOFA, requested that the U.S. Forces bear the expense.

Itemized invoices prepared by the DB (dated March 28, 1978) were forwarded with a letter dated September 28, 1978, from the German Superior Finance Administration to the U.S. Forces. The invoices, totalling $DM 54,109.79 for Grafenwoehr and $DM 77,104.30 for Vilseck, appear to include the entire cost (labor, materials, equipment, transportation, etc.) of the improvements. The letter itself requested payment by the U.S. Forces pursuant to Articles 48, 53 and 63 of the Supplementary Agreement to the NATO SOFA.

By letter of September 24, 1980, the Grafenwoehr Sub-Office of the U.S Army Procurement Agency, Europe, responded to a subsequent payment demand by the DB (dated August 21, 1980). In its response the Sub-Office agreed that the U.S. Seventh Army Training Command was responsible for the cost

of the improvements and, pending further processing (including a review of the claim for legal sufficiency), promised payment of the amounts claimed.

In January 1981, however, the matter was forwarded to Headquarters, U.S. Army Contracting Agency, Europe (USACAE) for further evaluation. Following a determination by Headquarters, U.S. Army, Europe and Seventh Army, Office of the Judge Advocate that payment is not required by treaty, the claim was submitted to this Office. For the reasons discussed below, the USACAE considers the claim "doubtful", and recommends denial.

Relevant Treaty Provisions

In a memorandum dated March 16, 1982, the Office of the Judge Advocate discussed in detail the various NATO treaty provisions cited by the German authorities in support of their claim for payment.

The Judge Advocate's memorandum states that under the NATO SOFA and its Supplementary Agreement, the U.S. Forces control the limited access tracks at Grafenwoehr and Vilseck, but the tracks are owned by the FRG, which holds the reversionary interest. Article 48(4) of the Supplementary Agreement provides that the U.S. is responsible for "such repairs as are required to keep the accommodation made available to it in a proper state of preservation." Concluding that the U.S. is not obligated to pay for the improvements under Article 48, the Judge Advocate states:

> "The work initiated by the DB cannot reasonably be characterized as repairs or maintenance designed to preserve the accommodation as it was received, but was rather the replacement of an already existing and functional system with a new improved system designed to meet increased German standards of performance."

Under Article IX, Section 7 of the NATO SOFA, as modified by Articles 47 and 49 of the Supplementary Agreement, the general duty of U.S. Forces to pay for goods and services, or for construction is contingent upon the U.S. Forces first soliciting the goods or services, or requesting the construction. Applying these provisions, the Judge Advocate states:

> "In the case at hand, the U.S. Forces did not request the installation of the signals, nor, when they were approached by the German authorities regarding the installation of the switches, did they agree to pay for them. Therefore, the U.S. Forces are not obligated under these provisions * * * to pay for the installation of the signals."

Procedures for cooperation between the U.S. and Germany on matters concerning the accommodations provided to the U.S. Forces are detailed in Article 53 of the Supplementary Agreement. Under Article 53(3) the U.S. Forces are required to "ensure that the German authorities are able to take, within the accommodation, such measures as are necessary to safeguard German interests." Pursuant to Article 53, a U.S.-German Advisory Committee was in existence before and during the period when the improvements were installed. The Committee, which was to agree on any measures taken within the accommodation, was apparently not consulted on these construction projects.

Noting that the cooperation procedures do not address the allocation of costs for measures taken, the Judge Advocate states:

> "Because the accommodation remains German owned (albeit in the hands of the U.S. Forces) there is nothing which would preclude construction by the German government (or an instrumentality thereof such as the DB) on any installation made available for the use of the U.S. Forces, nor is there any requirement that the U.S. Forces contribute to such construction. The only caveat is that such construction must be coordinated with and agreed to by the U.S. authorities in accordance with the cooperation procedure of [Article 53(3) of the Supplementary Agreement]."

Finally, Article 63 of the Supplementary Agreement to the NATO SOFA provides that, by agreement between the parties, certain costs may be shared by the FRG and the U.S. Forces in proportion to their respective interests. Because the DB and the Bundeswehr also use the U.S. controlled tracks at Grafenwoehr and Vilseck, in the Judge Advocate's view the DB had a far greater interest in the installation of the new equipment than any other party.

And, in an apparent reference to the initial conversation between the DB official and the Grafenwoehr Facilities Engineer, the Judge Advocate concludes, "[the DB] and the U.S. Forces agreed that the U.S. would bear the cost of site preparation and the German authorities would bear the rest."

In pertinent part, Article 63, paragraph 6(b) of the Supplementary Agreement provides:

> "If installations and facilities serving transportation * * * which are established, modified, reinforced, or extended at the instance of the authorities of a force * * * serve also to satisfy German needs, the expenditure * * * shall be apportioned in a manner which corresponds to the extent of the German interest as compared with the interest of the sending State. The amounts shall in each individual case be agreed between the German authorities and the authorities of the force.* * *" (Emphasis added.)

There is no similar provision in the Supplementary Agreement to cover the situation where facilities serving transportation are established, modified, reinforced, or extended at the instance of the German authorities.

Discussion

In this case, the U.S. Forces and the DB did not enter into either a formal contract or a cooperation agreement concerning the railroad improvements at Grafenwoehr and Vilseck. Neither was the work done at the instance of the U.S. Forces. On the contrary, the DB informed the Forces that the equipment installations were required by a new safety standard which applied to the entire German rail system. Both the initial representations that the construction would be accomplished at no cost to the U.S. Forces, and the subsequent billing for the entire cost of that construction were determinations made solely by the German authorities, independent of U.S. involvement. Absent express statutory authority, appropriated funds may not be used for the permanent improvement of property which is not owned by the Government. (53 Comp. Gen. 351 (1973); 39 Comp. Gen. 388 (1959)). Exceptions to this rule have been recognized only in cases where, among other requirements, the improvements are for the principal benefit of the Government, the expenditures are both reasonable and in reasonable proportion to the Government's interest in the

facilities, and the improvements will not be beneficial to the owner of the property after the Government's interest has ended. (46 Comp. Gen. 25 (1966); 42 Comp. Gen. 480 (1963); 35 Comp. Gen. 715 (1956)).

In our view, by improving the safety of rail connections throughout Germany, the FRG acted to protect its own interests. The integrity of the new system apparently required that all German-owned connections be made to comply with the increased performance standards. The benefit received by the U.S. Forces from the improved safety of rail traffic on the limited access tracks at Grafenwoehr and Vilseck is simply the unavoidable result of improvements made to the German rail system as a whole. In addition, to the extent that the training facility sidings are also used by the DB and the Bundeswehr, the FRG shares the benefit of improved safety on the U.S. controlled tracks.

Conclusion

In this case the DB authorities made improvements to property owned by the FRG and controlled by the U.S. as NATO treaty accommodations made available for the use of U.S. Forces. The right of the German authorities to enter the accommodations to take measures to protect German interests is guaranteed under Article 53 of the Supplementary Agreement to the NATO SOFA. There is no indication, however, that the formal cooperation procedures established under Article 53 were followed for the rail improvements at Grafenwoehr and Vilseck.[1/] Rather, the German authorities simply informed the U.S. Forces of their intended actions - first stating that the equipment installations would be made at no cost to the U.S.; then, after construction was substantially underway, indicating that the U.S. would be charged for the improvements; and finally, more than 1 year after the project was completed, sending itemized invoices covering all DB costs associated with the work at the two locations.

1/ We note that the earthwork done by the U.S. Forces at the request of the DB would probably have been a proper U.S. contribution under an Article 53 cooperation agreement. As no additional appropriations were used, this Office has no objection to the use of U.S. troops to prepare the construction sites at Grafenwoehr and Vilseck.

Accordingly, the claim of the Deutsche Bundesbahn for $DM 131,214.09 is not cognizable under the relevant provisions of the SOFA and must be denied.

for Milton J. Socolar
Comptroller General
of the United States